

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 06-CV-688 (DMC)

)
DEBORAH FELLNER,)
Individually and on Behalf of Those)
Similarly Situated,)
)
Plaintiffs,)
)
v.)
)
TRI-UNION SEAFOODS, L.L.C.,)
d/b/a CHICKEN OF THE SEA,)
)
Defendant.)
)

RETURN DATE: APRIL 10, 2006

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The Plaintiff, Deborah Fellner ("Plaintiff"), filed a Class Action Complaint ("Complaint"), against the sole Defendant, Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea ("Defendant"), a manufacturer and distributor of canned tuna, for violation of the New Jersey Products Liability Act, violation of the New Jersey Consumer Fraud Act, and common law fraud for canning and distributing tuna which purportedly contained methylmercury and failing to disclose to the public that consumption of tuna containing methylmercury could result in mercury poisoning by using a warning label. Pursuant to Fed. R. Civ. P. 12(b)(6), the Defendant moves to dismiss Counts I through IV contained in the Complaint as Counts I through IV fail to state facts sufficient to state a cause of action against the Defendant.

The claims set forth in the Complaint are deficient in several respects and should be dismissed, with prejudice, in their entirety, for the following reasons: (1) the United States Food and Drug Administration pre-empts state law in the areas of establishing the maximum allowable

concentration of methylmercury in fish and of advising/warning consumers about the presence of methylmercury in tuna and its potential effects upon consumption; (2) Defendant is not liable under New Jersey law for injuries incurred by Plaintiff for abnormal consumption of its product (tuna); (3) New Jersey law does not impose a duty upon Defendant to warn potential plaintiffs about a product that only may be dangerous if over-consumed; and (4) Plaintiff's claim for common-law fraud is subsumed by the New Jersey Products Liability Act thereby rendering Count IV moot.

In support of this motion, the Defendant submits and incorporates herein by reference (1) *Defendant's Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Complaint*; (2) *Defendant's Motion Requesting Judicial Notice in Support of Its Motion to Dismiss Plaintiff's Complaint and Motion to Dismiss Plaintiff's Class Action Allegations*; and (3) all exhibits attached thereto, all of which have been filed herewith.

WHEREFORE, the Defendant Tri-Union Seafoods, L.L.C., d/b/a Chicken of the Sea, requests that this Court enter an Order dismissing Counts I, II, III and IV, in their entirety.

Respectfully submitted,
TRI-UNION SEAFOODS, L.L.C.,
d/b/a CHICKEN OF THE SEA
By its attorney,

/s/ Kenneth A. Schoen
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DATED: March 9, 2006